

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FS:HAR:TL-N-3909-01

CJSantaniello

date: **AUG 1 2001**

to: Ronald Hathaway, Team Manager, LMSB, Group 1157, Hartford, CT
Attn: Revenue Agent James L. Russo

from: Associate Area Counsel, LMSB, Area 1

subject: **Large Case Advisory Opinion -** [REDACTED]

This memorandum responds to your request for assistance dated June 26, 2001. This memorandum should not be cited as precedent.

In your memorandum, you request our legal advice regarding the validity of the Form 872 extending the limitations period for [REDACTED]'s ([REDACTED]'s) taxable year [REDACTED]. For the reasons set forth below, it does not appear that the Form 872 is valid because [REDACTED], who signed the form on behalf of [REDACTED], was not the corporation's duly authorized representative for the year in question. We base this conclusion on the fact that the Form 2848 purportedly authorizing [REDACTED] to represent [REDACTED] was not signed by a duly authorized representative of [REDACTED], which continues to exist after it was acquired by [REDACTED] ([REDACTED] on [REDACTED]).

Issue

Whether the Form 872 extending the limitations period for [REDACTED]'s taxable year [REDACTED] is valid. **U.I.L. No. 6501.008-10**

Facts

Prior to [REDACTED], [REDACTED] was a stand-alone investment company. The corporation filed Forms 1120 for its taxable years [REDACTED] and [REDACTED].

On or about [REDACTED], [REDACTED] a tax exempt entity, acquired [REDACTED] for \$[REDACTED]. It is unknown whether this was a stock or asset acquisition. It is also unclear whether [REDACTED] ceased or continued to exist following the sale, although the facts strongly suggest that the corporation did not liquidate or

merge into [REDACTED].^{1/} We have been also advised that, even if [REDACTED] still exists, it has been inactive since [REDACTED].

On its "final" Form 1120 for the short taxable year ended [REDACTED], [REDACTED] claimed a substantial net operating loss.^{2/} In the absence of information regarding when that return was filed, we will presume for statute of limitations purposes that it was timely filed on [REDACTED]. Thereafter, [REDACTED] filed a Form 1139 for [REDACTED], claiming an overpayment for that year of approximately \$[REDACTED]. The refund of the overpayment was issued in the full amount claimed. This is now a Joint Committee case. The Service does not intend to examine [REDACTED]'s Form 1120 in any respect other than the net operating loss carryback.

On or about [REDACTED], the Service received a Form 2848, authorizing [REDACTED] of [REDACTED] to represent [REDACTED] relating to the corporation's Forms 1120 for its years [REDACTED], [REDACTED], and [REDACTED] (short period) relating to Forms 1120 and 1120X. The Form 2848 was signed by [REDACTED] in her capacity as "Authorized Signatory". According to written responses from [REDACTED], [REDACTED] is the Secretary and Vice President, Legal, of [REDACTED], [REDACTED]'s investment advisor pursuant to an Existing Assets Management Agreement dated [REDACTED] between [REDACTED] and [REDACTED]. [REDACTED] is not a party to this agreement.

^{1/} In response to the revenue agent's inquiry, the representative stated that the corporation "is no longer an operating business." It is unclear, however, whether this means that the corporation has been liquidated or whether it continues to exist but does not engage in any business activities. This statement is, however, inconsistent with his claim that "[REDACTED] became a tax exempt entity after the acquisition and continues to hold [REDACTED] stock". As of [REDACTED], the representative was not certain as to whether [REDACTED] still exists.

^{2/} Based on certain documents received during the audit, the revenue agent believes that this loss may be attributable to a corporate tax shelter.

^{3/} As noted above, [REDACTED] filed a return for the short period ending [REDACTED], as opposed to a calendar year return. Regardless, this, standing alone, would not invalidate an otherwise valid Form 872 for [REDACTED]. It is well settled that a waiver for a calendar year is valid to extend the limitations for a fiscal year ending within that calendar year. Consumers' Ice. Co. v. United States, 50 F.2d 341 (1931); Worumbo Mfg. Co. v. Commissioner, 13 B.T.A. 883 (1928).

██████████'s alleged status as "Authorized Signatory" emanates from ██████████'s investment resolutions, which provide as follows:

BE IT FURTHER RESOLVED that, for the purpose of executing any and all instruments, documents and other writings, and of providing any oral instructions, with respect to the transactions and arrangements referred to in the preceding resolution, on or after ██████████, the following persons are hereby designated as Authorized Signatories, in each case only with respect to such categories of transactions and arrangements as are set forth opposite the respective name, and provided that each such execution by [██████████] on behalf of ██████████ with respect to Private Equity Investments, Real Estate ██████████ and Other Activities requires prior initialing by the Vice President, Legal, and execution by at least two such Authorized Signatories, one of which must be [██████████].

<u>Name and Title</u>	<u>Authorized Signatory with respect to</u>
██████████, Vice President, Legal and Secretary	Cash Receipts Proxy Voting Special Activities Other Activities

Among the powers set forth in the resolutions relating to the enumerated categories are the following:

Special Activities

To...(ii) execute and deliver necessary or desirable compliance filings with the Securities Exchange Commission or any other governmental authority or agency in connection with [██████████]....

Other Activities

In general to perform all other acts and do all other things usually incident to the management and disposition of the Assets and the exercise of all other authority conferred upon [██████████] by ██████████ pursuant to the [Existing Assets management Agreement] or otherwise.

On [REDACTED], [REDACTED] executed Form 872 for [REDACTED], purportedly extending [REDACTED]'s statute of limitations for that year to [REDACTED]. There is no evidence, however, that [REDACTED] ever expressly authorized [REDACTED], [REDACTED] or [REDACTED] to represent it relating to its taxable years [REDACTED], [REDACTED], or [REDACTED].

The Service is currently examining [REDACTED]'s Form 1120 for the short taxable year ended [REDACTED]. In connection with this audit, the revenue agent is requesting a further statute extension for [REDACTED], as well as initial statute extensions for [REDACTED] and [REDACTED]. According to the revenue agent, however, the taxpayer has been reluctant to provide information regarding its corporate status following [REDACTED] and/or specific details of its relationship to [REDACTED]. The limitations periods for [REDACTED] and [REDACTED] will expire on [REDACTED] and [REDACTED], respectively.

Discussion

Section 6501(a)^{4/} provides generally that tax must be assessed within three years of the filing date of the return. Under section 6501(c)(4), a taxpayer and the Service may consent in writing to extend the time for making assessments if the consent is executed before the three-year assessment period or, in the case of successive agreements, before a previously-extended period expires.

The regulations under section 6501(c)(4) do not specify who may sign consents executed under that section. Accordingly, the Service will generally apply the rules applicable to execution of the original return to consents to the extension of time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Section 6062 provides, generally, that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return.

^{4/} All statutory section references are to Internal Revenue Code in effect during the years in question.

A power of attorney or authorization is a prerequisite to representing a taxpayer before the Service. In general, a power of attorney must contain certain information concerning the taxpayer, the recognized representative, and the specific tax matters for which the authorized representative is authorized to act. Treas. Reg. § 601.501(a). The specific requirements for a power of attorney are set forth in Treas. Reg. § 601.503(a), and include the following:

- (1) name and mailing address of the taxpayer;
- (2) identification number of the taxpayer;
- (3) employee plan number (if applicable);
- (4) name address of the recognized representative;
- (5) description of the matters for which representation is authorized which, if applicable, must include -
 - (i) the type of tax involved;
 - (ii) the federal tax form number; and
 - (iii) the specific years/periods involved.

A recognized representative must attach to the power of attorney a written practice declaration. Treas. Reg. § 601.502(c).

A properly completed Form 2848 satisfies the requirements for both a power of attorney (as described in Treas. Reg. § 601.503(a)) and a practice declaration (as described in Treas. Reg. § 601.502(c)). The Service will, however, accept a power of attorney other than Form 2848 provided the document satisfies the requirements of Treas. Reg. § 601.503(a)(1) through (a)(5). A Form 2848 is required in order for a representative to execute a consent to extend the statutory period for assessment. Treas. Reg. § 601.504(a)(3).

A properly executed Form 2848 grants all powers that the taxpayer has except signing a return and cashing a refund check.^{5/} In the case of a corporation, a Form 2848 must be signed by an officer of the corporation having authority to legally bind the corporation. Treas. Reg. § 601.503(c)(3). A taxpayer who executes a valid Form 2848 is normally bound by the acts performed by the agent pursuant to the power of attorney. Lavine v. Commissioner, T.C. Memo. 1995-270; Scherr v. Commissioner, T.C. Memo. 1991-92.

In this case, because [REDACTED] was a stand alone corporation in [REDACTED], [REDACTED], and [REDACTED], the consolidated return regulations in Treas. Reg. § 1.1502-77 do not apply for consents relating to those years. Moreover, since [REDACTED] appears to exist as a separate legal entity, only it may authorize another to act on its behalf for the pre-acquisition tax years. In this regard, there is no indication that [REDACTED] expressly authorized either [REDACTED], [REDACTED], or [REDACTED] to represent it regarding the years in question.^{6/} Consequently, the Form 2848 signed by [REDACTED] authorizing [REDACTED] to represent [REDACTED] for those periods is invalid because she was not authorized to act on its behalf. The Form 872 for [REDACTED] signed by [REDACTED] is, therefore, invalid, thus precluding a subsequent Form 872 for that year because the limitations period for that year has already expired.

It is arguable, however, that because [REDACTED] owns all of [REDACTED]'s outstanding stock, it had implied authority to act on [REDACTED]'s behalf for both pre and post-acquisition taxable years. Even so, any argument that [REDACTED] properly designated [REDACTED] as power of attorney for [REDACTED], which in turn named [REDACTED] as [REDACTED]'s representative, is flawed in two material respects.

^{5/} Form 2848, Part I, line 5 provides that

[t]he representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns.

^{6/} Even if [REDACTED] did sign a Form 2848 authorizing [REDACTED] to represent it, the form expressly provides that a power of attorney is not authorized to substitute another representative unless specifically provided in the form.

First, [REDACTED] did not execute either a Form 2848 or another document that satisfies the requirements of Treas. Reg. § 601.503(a). Additionally, the Existing Assets Management Agreement between [REDACTED] and [REDACTED] is completely silent regarding tax matters, such as with respect to the type of tax involved, the federal tax form number; and the specific years or periods involved. Accordingly, [REDACTED] cannot be considered [REDACTED]'s power of attorney.

Second, [REDACTED] lacked authority to substitute [REDACTED] or anyone else as [REDACTED]'s power of attorney in this matter. Under Treas. Reg. § 601.505(b)(2), a recognized representative appointed in a power of attorney may substitute or delegate authority under the power of attorney to another recognized representative only if substitution or delegation is specifically permitted under the power of attorney (of which there is none here). Consequently, even if [REDACTED] could somehow be construed as [REDACTED]'s valid power of attorney, any further appointment (to [REDACTED]) was improper and, therefore, invalid.

Our advice herein assumes that [REDACTED] continues to exist and that it was a stand alone corporation for the years in question. Under this scenario, and based upon the foregoing reasons, the statute of limitations for [REDACTED] has already expired. If, however, you later determine that the corporation did, in fact, cease to exist and/or that it was a parent of a consolidated group for those years, we recommend that you request additional advice from this office. If [REDACTED] no longer exists, you should also endeavor to determine the circumstances or manner in which its corporate existence terminated.

Finally, even if the three-year limitations period for [REDACTED] has expired, all is not lost in this case. Section 6501(h) provides that in the case of a deficiency attributable to the application of a net operating loss carryback or capital loss carryback, such deficiency may be assessed at any time before the expiration of the period within which a deficiency for the taxable year of the net operating loss or net capital loss which results in such carryback may be assessed. Thus, because the statute of limitations for [REDACTED]'s short period ended [REDACTED] will not expire until at least [REDACTED], the Service may assess the [REDACTED] deficiency attributable to the capital loss carryback until that date.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if

necessary, we will send you a supplemental memorandum incorporating any such recommendation.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

Since there is no further action required by this office, we will close our file in this matter ten days from the issuance of this memorandum or upon our receipt of written advice from the National Office, whichever occurs later.

Please call Carmino J. Santaniello at (860) 290-4075 if you have any questions or require further assistance.

BRADFORD A. JOHNSON
Associate Area Counsel
LMSB, Area 1

By: _____
CARMINO J. SANTANIELLO
Attorney